Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

—v.—

DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

PETITION FOR CERTIORARI FILED JULY 29, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

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—*v.*—

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
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INDEX

	Page
Relevant Docket entries in the proceeding below	1
Search warrant application and affidavit	5
Motion to Suppress Evidence and Request for Hearing	11
Trial transcript (Excerpts)	13
a) Discussion and ruling at suppression hearing [pages 4-3]	14
b) Testimony of Mrs. Bailey [pages 76-77]	28
c) Testimony of Detective Brooks [pages 191-6]	29
d) Testimony of Detective Brooks [pages 215-222]	32
e) Testimony of Mr. Lucas [pages 245-247]	36
f) Testimony of Mr. Franks [pages 253-254]	37
Judgment and Opinion of the Supreme Court of the State of Delaware	38
Order of the Supreme Court of the United States granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	41

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

THE STATE OF DELAWARE

vs.

JEROME FRANKS

IK-76-03-0120—RAPE FIRST DEGREE
IK-76-03-0121—BURGLARY FIRST DEGREE
IK-76-03-0122—KIDNAPPING SECOND DEGREE

RELEVANT DOCKET ENTRIES

1976 March 26 Commitment, Complaint & Warrant rec'd and filed.

1976 April 5 True Bill returned by the Grand Jury. Joseph J. Longobardi, Judge, rec'd and filed.

1976 April 8 Letter from Gary Dean rec'd and filed.

1976 April 15 Motion For Psychiatric Evaluation rec'd and filed.

1976 April 15 Order rec'd and filed.

1976 April 20 Request for Discovery (letter) rec'd and filed.

1976 April 22 Answer to Request For Discovery (letter) rec'd and filed.

1976 April 23 Letter from Gary Dean rec'd and filed.

1976 April 23 Defendant appeared in open Court. Reading of Indictment waived. Entered a plea of Not guilty. Rec'd and filed.

1976 May 14 Motion for Psychiatric Evaluation presented in open court. Order signed. Judge will give dates for the doctors to appear at the prison for evaluation. Attorney General's Office to prepare an Order as to States' Psychiatric examination, Mr. Finocchiaro to be filed by Attorney General.

1976 May 14 And Now, To Wit, this 14th day of May, A.D., 1976, it appearing upon application of David D. Finnocchiaro, Assistant Public Defender and Attorney for Jerome Franks, that a psychiatric and Psychological examination would be of assistance to him and his client in the preparation of the defense of the case;

It Is Ordered that Jerome Franks may be examined by Cono A. Gallianim Ph. D. at the Delaware Correctional Center, Smyrna, Delaware; and

It Is Also Ordered that Jerome Franks may be examined by George E. Voegele, M.D., at the Delaware Correctional Center, Smyrna, Delaware At Defendants costs. Judge will give dates for doctors to appear at prison. Joseph J. Longobardi, Judge.

1976 May 18 Order rec'd and filed.

It Is Hereby Ordered That the defendant Jerome Franks be examined by a competent psychiatrist and a competent psychologist. Joseph J. Longobardi, Judge.

1976 May 27 Request For Discovery rec'd and filed.

1976 June 7 Answer to Request For Discovery, rec'd and filed.

1976 July 18 Letter from Gary Dean, rec'd and filed.

1976 July 21 Psychiatric Report, rec'd and filed.

1976 July 22 Subpeonas requested, Subpeonas issued.

1976 July 26 Motion to Suppress Evidence and Request for Hearing rec'd and filed.

1976 July 30 Subpeonas requested, subpeonas issued.

1976 August 2 Motion to Suppress Evidence was held in open Court prior to the trial. Motion Denied. William G. Bush, III, Judge.

1976 August 2 Request For Voir Dire Questions, rec'd and filed.

1976 August 2, 3, 4, 5 The above-named defendant went on Trial before the following Sworn Jury: Michael Halada, Linda Curtis Adams, Nancy V. Norris, Mary Catherine Clendaniel, Lilly Marie Benson, Doris C. Backus, Dorothy M. Gooden, Marion O. Lewis, David H. Knox, Mary E. Hartle, Allen Warnick, David H. Garrison and Alt. Dorothy E. Gray. The defendant was tried on three charges. After hearing the evidence presented by the State and the testimony of the defense, the Jury retired to deliberate. At the conclusion of their deliberation, the Jury returned a verdict of Guilty to all three charges. William G. Bush, III, Judge.

1976 August 5 Request For Jury Instructions, rec'd and filed.

1976 August 16 Notice of Motion, Motion For Judgment of Acquittal and/or New Trial, Order, (not signed) rec'd and filed.

1976 August 19 Request For a Hearing rec'd and filed.

1976 September 3 Motion for Judgment of Acquittal and/or New Trial and Request for Hearing presented in open Court. Denied. William G. Bush, III, Judge.

1976 September 3 IK-76-03-0120-Sentence-Pay costs of prosecution. (Suspended). Be in prison for a period of your Natural Life beginning March 15, 2026. Be delivered to the Division of Adult Corrections of the Department of Health & Social Services for the purpose of carrying out this sentence. William G. Bush, III, Judge.

IK-76-03-0121-Sentence-Pay costs of prosecution. (Suspended). Be in prison for a period of Twenty-Five (25) Years, beginning March 17, 1976 and ending March 16, 2001. Be delivered to the Division of Adult Corrections of the Department of Health & Social Services for the purpose of carrying out this sentence. William G. Bush, III, Judge.

IK-76-03-0122-Sentence-Pay costs of prosecution. (Suspended). Be imprisoned for a period of Twenty-Five (25) Years, beginning March 16, 2001 and ending March 15, 2026. Be delivered to the Division of Adult Corrections of the Department of Health & Social Services for the purpose of carrying out this sentence. William G. Bush, III, Judge.

1976 September 29 Notice of Appeal rec'd and filed.

1976 October 1 Request for Transcript, rec'd and filed.

1976 October 5 Transcript of Motion for Judgment of Acquittal and/or New Trial and Transcript of Sentencing, rec'd and filed.

1976 October 25 Your application for reduction of sentence is hereby denied. William G. Bush, III, Judge. Rec'd and filed.

1976 November 23 Excerpts of trial record rec'd and filed.

1977 February 15 Excerpts of defendant's opening statement rec'd and filed.

1977 May 17 Mandate rec'd and filed on consideration whereof it is ordered and adjudged that the said judgment or order be and it is hereby affirmed.

1977 August 26 Application for reduction of sentence is denied. William G. Bush, III, Judge.

J. P. COURT #7

IN THE MATTER OF: Jerome Franks, B/M, DOB: 10/9/54 and 222 S. Governors Ave., Apt. #3, Dover, Delaware. A two room apartment located on the South side, second floor, of a white block building on the west side of S. Governors Avenue, Between Loockerman Street and North Street, in the City of Dover. The ground floor of this building houses Wayman's Barber Shop.

STATE OF DELAWARE)
COUNTY OF KENT) ss:
)

Be it remembered that on this 9th day of March A.D. 1976 before me John Green, personally appeared Det. Ronald R. Brooks and Det. Larry Gray of the Dover Police Department who being by me duly sworn depose and say:

That they have reason to believe and do believe that in the 222 S. Governors Avenue, Apartment #3, Dover, Delaware. A two room apartment located on the south side second floor of a white block building on the west side of S. Governors Avenue between Loockerman Street and North Street in the City of Dover. The ground floor of this building houses Wayman's Barber Shop the occupant of which is Jerome Franks there has been and/or there is now located and/or concealed certain property in said house, place, conveyance and/or on the person or persons of the occupants thereof, consisting of property, papers, articles, or things which are the instruments of criminal offense, and/or obtained in the commission of a crime, and/or designated to be used in the commission of a crime, and not reasonably calculated to be used for any other purpose and/or the possession of which is unlawful, papers, articles, or things which are of an evidentiary nature pertaining to the commission of a crime or crimes specified therein and in particular, a white knit thermal undershirt; a brown ¾ length leather jacket with a tie-belt; a pair of black mens pants; a dark colored knit hat; a long thin bladed knife or other instruments or items relating to the crime.

Articles, or things were, are, or will be possessed and/or used in violation of Title 11, Sub-Chapter D, Section 763, Delaware Code in that [See attached probable cause page].

Wherefore, affiants pray that a search warrant may be issued authorizing a search of the aforesaid 222 S. Governors Avenue, Apartment #3, Dover, Delaware. A two room apartment located on the south side second floor of a white block building on the west side of S. Governors Avenue between Loockerman St. and North Street, in the City of Dover in the manner provided by law.

/s/ Det. Ronald R. Brooks
Affiant

/s/ Det. Larry D. Gray
Affiant

SWORN to (or affirmed) and subscribed before me this 9th day of March A.D. 1976.

/s/ John [illegible] Green
Judge Ct 7

The facts tending to establish probable cause for the issuance of this search warrant are:

1. On Saturday, 2/28/76, Brenda L. Bradley, W/F/15, reported to the Dover Police Department that she had been kidnapped and raped.
2. An investigation of this complaint was conducted by Det. Boyce Failing of the Dover Police Department.
3. Investigation of the aforementioned complaint revealed that Brenda Bradley, while under the influence of drugs, was taken to 222 S. Governors Avenue, Apartment 3, Dover, Delaware.

4. Investigation of the aforementioned complaint revealed that 222 S. Governors Avenue, Apartment #3, Dover, Delaware, is the residence of Jerome Franks, B/M DOB: 10/9/54.
5. Investigation of the aforementioned complaint revealed that on Saturday, 2/29/76, Jerome Franks did have sexual contact with Brenda Bradley without her consent.
6. On Thursday, 3/4/76 at the Dover Police Department, Brenda Bradley revealed to Det. Boyce Failing that Jerome Franks was the person who committed the Sexual Assault against her.
7. On Friday, 3/5/76, Jerome Franks was placed under arrest by Cpl. Robert McClements of the Dover Police Department, and charged with Sexual Misconduct.
8. On 3/5/76 at Family Court in Dover, Delaware, Jerome Franks did, after being arrested on the charge of Sexual Misconduct, made a statement to Cpl. Robert McClements, that he thought the charge was concerning Cynthia Bailey not Brenda Bradley.
9. On Friday, 3/5/76, Cynthia C. Bailey, W/F/21 of 132 North Street, Dover, Delaware, did report to Dover Police Department that she had been raped at her residence during the night.
10. Investigation conducted by your affiant on Friday, 3/5/76, revealed the perpetrator of the crime to be an unknown black male, approximately 5'7", 150 lbs., dark complexion, wearing white thermal undershirt, black pants with a belt having a silver or gold buckle, a brown leather ¾ length coat with a tie belt in the front, and a dark knit cap pulled around the eyes.
11. Your affiant can state, that during the commission of this crime, Cynthia Bailey was forced at knife point and with the threat of death to engage in sexual intercourse with the perpetrator of the crime.

12. Your affiant can state that entry was gained to the residence of Cynthia Bailey through a window located on the east side of the residence.
13. Your affiant can state that the residence of Jerome Franks is within a very short distance and direct sight of the residence of Cynthia Bailey.
14. Your affiant can state that the description given by Cynthia Bailey of the unknown black male does coincide with the description of Jerome Franks.
15. On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people.
16. On Tuesday, 3/9/76, Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket.
17. On Tuesday, 3/9/76, Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat.
18. Your affiant can state that a check of official records reveals that in 1971 Jerome Franks was arrested for the crime of rape and subsequently convicted with Assault with intent to Rape.

J. P. COURT #7

IN THE MATTER OF: Jerome Franks, B/M, DOB: 10/9/54 and 222 S. Governors Ave., Apt. #3, Dover, Delaware. A two room apartment located on the South side, second floor, of a white block building on the west side of S. Governors Avenue, between Loockerman Street and North Street, in the City of Dover. The ground floor of this building houses Wayman's Barber Shop.

THE STATE OF DELAWARE TO: Det. Ronald R. Brooks and Det. Larry Gray of the Dover City Police Department with the assistance of any police officer or constable or any other necessary or proper person or persons or assistance.

GREETINGS:

Upon the annexed affidavit and application or complaint for a search warrant, as I am satisfied that there is probable cause to believe that certain property, namely: a white knit thermal undershirt; a brown ¾ length leather jacket with a tie-belt; a pair of black mens pants; a dark colored knit hat; a long thin bladed knife or other instruments or items relating to the crime is being concealed on the person/premises described in the annexed affidavit and application or complaint; and that search of the premises is necessary in order to prevent the escape or removal of the person or thing to be searched for;

NOW THEREFORE, YOU ARE HEREBY COMMANDED forthwith to search the above named person, persons, house, place or conveyance for the property specified in the annexed affidavit and application, and to search any occupant or occupants found in the house, place or conveyance above named for such property serving this warrant and making the search in the daytime, and, if the property, papers, articles, or things, or any part thereof, be found there, to seize it, prepare a written inventory of the property seized and to return the property and this warrant to be forthwith with the written inventory and

the person or persons in whose custody or possession the property was found to be dealt with according to law.

DATED the 9th day of March A.D. 1976.

/s/ John [illegible] Green
Judge—JP Court #7

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

Cr. A. No. IK-76-03-0120,
-0121,
-0122.

THE STATE OF DELAWARE, PLAINTIFF,

vs.

JEROME FRANKS, DEFENDANT.

MOTION TO SUPPRESS EVIDENCE — AND REQUEST FOR HEARING

COMES NOW, the Defendant, Jerome Franks, through his attorney, David D. Finocchiaro, Assistant Public Defender, in the above-captioned case, and moves, pursuant to Rule 41(e) of the Superior Court Criminal Rules, to suppress any evidence seized from him as a result of a search of his residence, occurring on or about the 9th day of March, 1976. Said search resulted in the seizure of items of clothing, a knife, and miscellaneous items.

The search and seizure was unlawful for the following reasons:

1. On or about March 9, 1976, the Defendant, Jerome Franks, was residing at 222 S. Governors Avenue, Apartment #3, Dover, Delaware.
2. On or about March 9, 1976, members of local police forces conducted a search of his residence.
3. No permission was given by the Defendant or anyone to permit a search of his apartment.
4. The search was not incident to a lawful arrest.
5. The search warrant used was legally insufficient in that it did not show sufficient probable cause.
6. The affidavit portion of the search warrant is merely conclusory.

7. Said search resulted in the seizure of items of clothing, a knife and miscellaneous items.
8. Certain items seized were not in plain view.

WHEREFORE, the Defendant, pursuant to Rule 47 of the Superior Court Criminal Rules, requests a hearing for the Court to consider if the aforesaid search and seizure was in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States and of Articles 1 and 6 of the Delaware Constitution of 1897, as amended.

/s/ David D. Finocchiaro
DAVID D. FINOCCHIARO
Assistant Public Defender
101 Court Street
Dover, Delaware 19901

DATED: 7/27/76

[1] IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

Criminal Action Nos. IK-76-03-0120, IK-76-03-0121, IK-76-03-0122

Trial: August 2nd, 3rd, 4th & 5th, 1976.

THE STATE OF DELAWARE

—*vs*—

JEROME FRANKS, DEFENDANT

BEFORE: HON. WILLIAM G. BUSH, III, J., and a jury.

APPEARANCES:

HARRISON F. TURNER, Esq.,
Deputy Attorney General on
behalf of the State of Delaware.

OFFICE OF THE PUBLIC DEFENDER
By: DAVID D. FINOCCHIARO, Esq.,
on behalf of the Defendant.

EXCERPTS OF TRIAL RECORD

• • • •

[4] THE COURT: The State of Delaware versus Jerome Franks, motion to suppress. Mr. Finocchiaro, you may proceed.

MR. FINOCCHIARO: Your Honor, first of all I would ask witnesses be sequestered during this hearing.

THE COURT: You may step outside in the hallway.

(The witnesses left the courtroom.)

MR. FINOCCHIARO: Initially, the Defense would like to call Detective Brooks to the stand.

THE COURT: Isn't this a motion to suppress the search warrant because it was not sufficient?

MR. FINOCCHIARO: Yes, Your Honor.

THE COURT: Then we are arguing about the contents of the search warrant, are we not?

MR. FINOCCHIARO: That is correct, Your Honor. I intend to produce testimony along those lines.

THE COURT: What is the need for testimony is [5] the next question if we are talking about whether the search warrant is sufficient?

MR. FINOCCHIARO: Your Honor, I have two particular reasons.

THE COURT: We are putting this on the record. We have discussed it the other day.

MR. FINOCCHIARO: I question the validity of certain of these points stated in the preliminary hearing—I'm sorry. I question the validity of some of the points made in the affidavit in this case that was involved in issuing the search warrant and, in addition, I question whether or not there was a prior potential violation of Mr. Franks' right whereby the fruit of the poisonous tree aspect may apply.

THE COURT: Anything further?

MR. FINOCCHIARO: They are the points, Your Honor, that I have. I intend to produce witnesses along these lines.

THE COURT: Is the search warrant in the file?

MR. FINOCCHIARO: I don't know if it is in your file or not, Your Honor.

THE COURT: It is not attached to your motion.

[6] MR. FINOCCHIARO: Apparently not.

THE COURT: I cannot rule upon it unless I can have it.

MR. FINOCCHIARO: The only copy I have, Your Honor, does have various notes made by me. I don't know if the Attorney General would have an unmarked one or not.

MR. TURNER: I have just one copy, but I would be glad to furnish it to the Court. Both the Court and I can use it I guess. I would like to respond if I may.

THE COURT: Let me see if I can make it clear. You feel certain matters in the motion to suppress are not correct and you wish to present evidence to show they are not correct.

MR. FINOCCHIARO: Yes, Your Honor. I believe a good portion of the information obtained in this affidavit is totally irrelevant to issuance of a search warrant and certain factors that were relied upon, I would say the stronger factors, some of them are incorrect and that there was misrepresentations made in the affidavit.

Further, another particular comment in Paragraph No. 8, I question whether or not there may have been any prior violations of Mr. Franks' rights such that whatever information they obtained, if it was obtained [7] unconstitutionally, could not be used as subsequent probable cause in the issuance of the search warrant.

MR. TURNER: May it please the Court. In response, may I point out that initially in the ruling upon the search warrant our Supreme Court has stated in Peason vs. State that sections 2306 and 2307 of 11 Delaware Code, like Federal Criminal Rule 41e contemplate a "four corners" test for probable cause. Sufficient facts must appear in the face of the affidavit so Magistrate's personal knowledge, notwithstanding a reviewing court, can verify the existence of probable cause. Thus, one looks only to the facts recited in the Complaint.

Thus, this is the interpretation that our Supreme Court has stated with respect to probable cause, looking only to the facts recited in the Complaint. You have a four corners test.

Now, as to Mr. Finocchiaro's wanting to call witnesses, may I refer the Court to first of all 68 AmJur 2nd Page 720. The Supreme Court—

THE COURT: Let's complete the record. What witnesses do you wish to call, and would you make a proffer of what they will testify to, Mr. Finocchiaro?

[8] MR. FINOCCHIARO: Yes, Your Honor. Would you like me to limit myself—or, first of all I will address what Colonel Turner has stated.

THE COURT: Not yet. Why don't you make your proffer and then we can delineate the issues.

MR. FINOCCHIARO: Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center and Mr. James Morrison, formerly of the Delaware Youth Center, who I believe will give information that will intend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.

THE COURT: That would be of what paragraph? Paragraph 15?

MR. FINOCCHIARO: Yes, Paragraphs 15, 16 and 17.

THE COURT: And what they would testify to would rebut what is in Paragraph 15, 16 and 17.

MR. FINOCCHIARO: Would rebut not only certain [9] factual matters, but also as to whether or not it was given and to whom it was given and in addition in Paragraph number 8—

THE COURT: In other words, they will say that none of that information was given?

MR. FINOCCHIARO: They will testify that neither one of them to the best of their knowledge gave this information to either of the affiants contained in this affidavit, and additionally that the information that they did give was somewhat different than contained in the affidavit and was not to an officer who even swore out the affidavit and that what was stated in there is not an accurate representation of precisely what they said.

THE COURT: So will you have other witnesses?

MR. FINOCCHIARO: Yes. I also intend to call Officer McClements of the Dover Police Department in reference to Paragraph No. 8. I feel that there should be a showing of absence of taint because I think the case law is clear that if something is obtained in violation of constitutional rights that cannot be used later to show probable cause in the issuance of a search, of an arrest or a search warrant, and basically then I [10] would possibly or potentially produce testimony of Mr. Franks. But they are the witnesses I would like to call. In addition I would like to call Detective Brooks.

THE COURT: What is your proffer of Mr. Franks?

MR. FINOCCHIARO: Mr. Franks will dispute some of those factors in there.

THE COURT: Which factors?

MR. FINOCCHIARO: Well, let me put it this way, Your Honor. I do not know what Officer McClements will testify to. His proffer will depend on the testimony of Officer McClements. I do not know whether he would agree or disagree with what he has to say.

THE COURT: You want to call Officer McClements, I presume, as a hostile witness, to examine him as to the contents of Paragraph No. 8?

MR. FINOCCHIARO: That is correct.

THE COURT: Now, we have delineated exactly what the Defendant intends to proceed on here.

MR. FINOCCHIARO: And, Your Honor, one additional point, I would anticipate calling Detective Brooks to question him as to the comments that he made in Paragraphs 15, 16 and 17, and I would also, as previously mentioned, [11] call both Mr. Morrison and Mr. Lucas in that same regard.

MR. TURNER: I will first approach this problem from the standpoint of whether Mr. Finocchiaro is entitled to call any witnesses.

As I have pointed out on probable cause, Pearson vs. State is the latest case on that and I have already recited that. It is to be based on the four corners.

Now, the motion we have before us is in connection with suppression which Mr. Finocchiaro has enlarged

upon that. He wants to test the validity of the statements in the affidavit.

I would like to refer the Court to the pertinent authority first, and I start off with 5 ALR 2nd Page 396. In absence of a statute the general rule basically—Delaware has no statute which would embrace this particular area. The cases involving the problem under annotation exhibit a number of different ways by which the question is actually presented to the appellant courts. All proceed on the assumption that after execution of the search warrant criminal proceedings have been brought.

A motion to quash the search warrant is one of [12] the ways of attacking.

I come to the key involving these various methods of raising the question, exhibiting the different specific challenges to the matter. In the supporting affidavit or complaint mentioned are a large number of decisions which represent an overwhelming majority of the cases decided apart from applicable statutes supporting the view that the matters contained in an affidavit or verified complaint on which a search warrant is based may not be questioned or disputed by the person against whom the warrant is directed. Citations on that: Illinois, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Oklahoma—many cases under each—Rhode Island, Tennessee, Texas, Washington, throughout the entire jurisdiction.

One particular case that comes to my attention, it is a Maryland case, Tucker vs. State 224 A. 2nd 111 certiorari denied, 386 U.S. 1024.

The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself and the truth of the alleged ground stated in the affidavit cannot be [13] controverted by receiving the testimony of the accused and of the witness. As I have said in Pearson vs. State one only looks to the facts recited in the affidavit in support of the search warrant.

I now pass to 68 AmJur 2nd at page 625. The Supreme Court of the United States has not directly passed

upon the question as to the extent to which a court may permit an attack upon the supporting affidavit for a search warrant where the warrant is valid on its face and the allegations of the affidavit, assuming them to be true, establish probable cause.

Rugendorf vs. the United States, 376 U.S. 528 held that even if such attack is proper it cannot be based on factual inaccuracies which are of only peripheral relevancy to showing of probable cause and which do nothing to the integrity of the affidavit.

A majority of the state courts which have considered the problem have held that in the absence of statute the matters contained in an affidavit in which the search warrant is based may not be disputed by the person against whom a warrant is directed for the purpose of showing the invalidity of the warrant. Citations: [14] Laberto vs. State, Arkansas; People vs. Sansbury, Illinois, certiorari denied; Mattingly vs. Commonwealth, Kentucky; Owens vs. State, Tennessee—all these cases, all state cases have held that you cannot go back behind the search warrant. It must be decided on the four corners. This is universal.

There was a Harvard Law Review section which in Volume 84, Harvard Law Review at page 830 emphasized the situation as it exists and in that article pointed out that state law, all states—most states considering the matter have denied it.

Now, since that time there are the circuit court jurisdictions. I might say that the 8th Circuit, the 6th Circuit, the 7th Circuit, and the 4th Circuit in the Court of Appeals of each circuit interpreting Rule 41e of the Federal Criminal Rules which differs from ours and has a statement in there that would allow the consideration of the matter. Rule 41 Criminal Procedure in Federal Law: A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress the evidence so obtained on the [15] ground that, one, the property was illegaly seized without warrant which doesn't apply here or, four, there was not probable cause for believing the existance of the

ground upon which the warrant was issued. There is the difference. Therefore, the Federal courts and certain cases have considered whether or not testimony could be taken in support of the affidavit.

The 4th, 6th, 7th and 8th Circuits, which I have the cases here: the 7th Circuit, United States vs. Carmicheal 489 F. 2nd 983, 1973; the 6th Circuit, United States vs. Luna 525 F. 2nd 4 1975; the 4th Circuit, United States vs. Lee 19 Criminal Law 2193, just decided in May; the 8th Circuit, United States vs. Marehart 492 F. 2nd 897. These Circuits all agree that only the deliberate inclusion of false statement or wreckless inclusion of false statement material to the establishment of probable cause. They take into consideration: Did the officer intend to deceive the magistrate? If such is so, then and there must be a showing of such before even a hearing is awarded.

The 5th Circuit and the 2nd and 1st Circuits: 5th Circuit in United States vs. Thomas 489 F. 2nd 664 also includes the misstatement with the intent to deceive [16] the magistrate must be involved.

Now, these cases are analyzed under United States vs. Lee which appears in 16 Criminal Law at page 2311 entitled: Search Warrant Challenges the Truthfulness of Supporting Affidavit. They analyzed these cases.

However, I am pointing out that even in the Federal where it is much stricter than what Mr. Finocchiaro tries to do here today, much stricter, they are still interpreting a different Rule 41e which we don't have.

I reiterate again all State courts, majority of State courts that have considered this question, have decided that you cannot go behind the affidavit. The Maryland court, which I have just cited as the most recent case in the nearest jurisdiction, but the jurisdictions which have ruled upon this are numerous, and as I quote from the authorities they have stated that you cannot go behind the truth of the warrant.

One case stated it just may not be disputed upon the facts that exist in the search warrant; therefore, the State would contend that the only thing before this Court, both by the motion of the Defendant and by case

law, is to decide on the four corners of this search [17] warrant application and the affidavit, whether it establishes probable cause and under these considerations I submit to the Court that under United States vs. Ventresca the Court must read the search warrant as a practical and not an abstract thing.

They must be tested and interpreted by the Magistrate Court in a common sense and realistic fashion. This is taken from United States vs. Ventresca 380 U.S. 102.

Quoting from Jones vs. United States 362 U.S. 257, 260, "A warrant must be looked at from a reasonable fashion." In that particular case they admit it. Affidavits are not drawn by lawyers but only by policemen not educated under the stress of need, and not educated as an attorney and they must be looked at realistically in order to arrive at whether or not probable cause has been established.

Under those circumstances I submit to the Court that the four corners of this warrant are the only thing to be considered at this time and the Court must consider and find probable cause is established by the warrant.

[18] THE COURT: So he is calling his first witness. You are in effect objecting to the relevancy of the proposed witness?

MR. TURNER: I am objecting to his going behind it in any way. I am stating that before the Court is a motion which it must decide on the four corners as indicated by Pearson and that is it.

MR. FINOCCHIARO: Your Honor, first of all the State has mentioned the use of the four corners test. I think that goes to an entirely different factor than what we have presented here.

I think the four corners test questions whether or not there can be, the affidavit can be supplemented by material presented to the Magistrate. In other words, supplemented orally, matters not contained in it, and the Court as a matter of practical necessity said that is ridiculous. Quite simply, how can we review, a higher court review what was said if it was only said orally? We must go by the affidavit.

This I feel is an entirely different aspect and as such it is not controlled by the four corners test at all and this point, as previously indicated, goes [19] whether I, the Defense, may present evidence not presented to the Magistrate that impeaches the representation of the affidavit.

I would like to bring to the Court's attention the United States Supreme Court case: North Carolina v. Renzi, June 17, 1974. It was for a petition for a writ of certiorari which was denied. In an opinion by Justice White he denied the writ of certiorari and went on to say, on the second page of that opinion on 94 Supreme Court Reporter 3182, "Whether a search warrant and supporting affidavit are adequate on their face may later be impeached is squarely presented here. The time is ripe for decision on this question for the courts are in conflict and the question is important for the proper administration of criminal justice." Unfortunately, Justice White did not go on to decide that particular question that I am aware.

He also points out in this, the United States Supreme Court case of Rugendorf vs. United States which does leave the question unsettled, but there it was talking about issues of peripheral relevancy.

I would also like to point out that some of [20] the cases cited indicate that—Steel vs. United States 267 U.S. 498 I feel can be interpreted to indicate the challenger may present evidence although Rugendorf as previously mentioned does treat the matter as unsettled.

North Carolina vs. Renzi previously mentioned does collect the views and indicates there is a vast disagreement among the states. It is ripe for consideration, it is ripe for decision. It has not been so and apparently, to the best of my research and apparently for the State's, for that matter has not been determined by this State.

Further, I think we are not talking about a matter of peripheral relevance here. The affidavit indicates that personal information, personal contact was made with certain witnesses and certain information was obtained. I intend to produce evidence that the person who said

that did not personally contact those individuals at all, and I think this is not dealing with peripheral relevancy. As such, I feel that there may have been at least some misrepresentation to the Magistrate from what I have been told that in fact they didn't even contact that person. They may have had some other information [21] a little bit different, but obtained through another police officer and they learned of it, but nevertheless apparently a misrepresentation to the Magistrate in the court below and I don't feel that is dealing with the peripheral relevancy.

I think any magistrate would be extremely upset if a police officer gave him an affidavit and it turned out later that officer did not obtain that information personally like the way he said it was. And, in addition, like I said, I think this issue is ripe at this time. I am taking the words of Justice White in that matter.

Further, I feel we have an additional problem here and that is that if the information obtained in Paragraph No. 8 was obtained in violation of constitutional rights that that should not later be used as probable cause to be used in the issuance of a search warrant. Since this matter has not been presented, I question whether this court can merely say Well, if some courts do not allow it and some courts do I will merely go by the majority without some type of independent evaluation by this court, and I feel that since we are not talking [22] about peripheral relevancy, but basic misrepresentation, this court should hear this testimony and make a decision on it.

MR. TURNER: I would like to answer that briefly. Just because Justice White has stated it is time for the Supreme Court of the United States to decide this case, it seems to me to be putting a hell of a burden on this court to step in and do what the Supreme Court has not.

In the Harvard Law Review article that I cited, it states, "It is deplorable at this late date. The law is in the state of confusion of whether the validity of the search warrant affidavit may be challenged. Motions to suppress evidence are made daily in trial courts, state

and federal, with the law so unsettled results vary from judge to judge. Respect for the judicial process must suffer. The time is ripe for the Supreme Court to clarify this important question."

In Rugendorf the Court assumed arguendo that such a challenge was available. Due respect for the fourth amendment protection against unreasonable searches should lead the Court now to give its assumption [23] the dignity of a firm holding.

In other words, this Law Review Article which is quite comprehensive states that it is ripe. Justice White states it is ripe, but nevertheless it hasn't been decided.

In the meantime, all State courts throughout the entire country, the jurisdictions have stated that it is not subject to attack and the various authorities on this case state that as I stated to you from AmJur 2nd, as I stated from 5 ALR 2nd. They are taking the cases in the different jurisdictions and they find the State courts have universally almost, there are a few isolated occasions where they have allowed it in, but the universal: No.

Now, the mere fact it might be ripe for decision in the Supreme Court of the United States should have no bearing on this court sitting here.

It is the contention of the State that this court should follow those lines or cases which are by far the majority view and under those circumstances the testimony is not admissible in connection to test the validity of the warrant.

I might state that Mr. Finocchiaro is arguing [24] about peripheral and nonperipheral which is taken from Rugendorf which approach the question, but did not decide it. So it is still up in the air. So whether it is peripheral or not is still beside the point.

The point is whether he can introduce testimony, and with all the state jurisdictions ruling against it I feel that this court would join the majority rather than the distinct and definite minority.

MR. FINOCCHIARO: Your Honor, if I may briefly respond. First of all, Colonel Turner made one statement which I think he later altered slightly. I think he

said all courts have said that it is not, cannot be challenged and I think he has indicated it is a majority. That is apparently incorrect. There are states that will allow the court or allow the Defendant, as the case may be, to challenge the affidavit. Included among those cases are: Alabama, California, New York and Pennsylvania and initially when he made the statement "all" apparently Delaware has not ruled on this issue and I don't think the court can merely toss a coin and say: If it is six to five or ten to five, whatever the case may be, then therefore that is the proper course to follow without [25] some type of independent evaluation. But I would like to go on.

Let me say that basically what I am indicating is not only a factual discrepancy, but I would say that there has been some type of misrepresentation as to what that police officer personally learned and related to the Magistrate, and I think that does make a stronger case where there is some type of bad faith or misrepresentation, and I am basing this solely on the information that is provided me by my witnesses. I have not talked to Detective Brooks about this. I don't know what his position is, but nevertheless I feel this issue is ripe.

I think Colonel Turner has indicated that and I don't think this court, where it has never been addressed to this court, can merely indicate if other states do it that way I would just go by the majority and disregard the minority and handle it in that fashion.

MR. TURNER: Most of those minority states have statutes which are invoked.

THE COURT: I am going to sustain the State's objection. You may proceed.

MR. FINOCCHIARO: Your Honor, I would like to [26] make a witness proffer if the Court would so allow.

THE COURT: You have already made a proffer.

MR. FINOCCHIARO: That is a lawyer proffer. I would like to make a witness proffer.

THE COURT: What is the difference.

MR. FINOCCHIARO: Well, I think they would perhaps state a little bit more emphatically.

THE COURT: Have the witnesses come in and tell us?

MR. FINOCCHIARO: Yes. I made my proffer, Your Honor, but I would still like to make a witness proffer.

MR. TURNER: May I suggest the Court has just ruled that that is exactly what it can't do.

THE COURT: All right. That is denied. Proceed.

MR. FINOCCHIARO: Your Honor, you have ruled apparently that regardless there is factual inaccuracies or misrepresentations in here that I am not allowed to challenge it. Nevertheless, I still question if your ruling goes to the effect that if there was a violation of Mr. Franks' rights, and I am talking in reference to Paragraph No. 8, and as such is tainted evidence, whether [27] or not the Court is going to allow me to examine whether or not there was any taint. In other words, whether or not it should be excluded from the search warrant. Perhaps I should repeat that.

In addition to my other argument there may be inaccuracies or misrepresentations, I feel that perhaps in reference to Paragraph No. 8 there may have been a violation of Mr. Franks' constitutional rights. I feel that evidence was tainted and that it should not be used as probable cause in the later obtaining of a search warrant.

I don't know if your ruling has precluded me from that also.

MR. TURNER: As I understand it, we are now at the position where the Court is about to decide the validity of the search warrant on the four corners; therefore, that issue seems to be the only one before the Court.

THE COURT: I presume he has some further comments as to Paragraph No. 8 in which I presume Mr. Finocchiaro was saying this was not argued and he wishes to present argument on Paragraph No. 8 as to facts. You wish to present evidence to show that the information [28] obtained in Paragraph No. 8 was obtained in violation of Defendant's constitutional rights.

MR. TURNER: Isn't he going back beyond the search warrant in that case to establish the validity of these things which, as I understand it, we have just finished

arguing? The Court has made its ruling. Is the Court going to allow him to go back and present testimony on the validity of the search warrant?

It is my understanding we are here on a suppression hearing. It is my further understanding that we have argued as to whether he can go back and present testimony as to the validity of those items in the search warrant. It is my further understanding the Court has ruled against it.

Now, we are at the position where, as I see it, before the Court is now the search warrant for decision as to whether it establishes probable cause without the necessity or actually the permission to call witnesses.

THE COURT: Is there additional argument you wish to make as to Paragraph No. 8 that you have not made?

MR. FINOCCHIARO: Yes, Your Honor [29] like to point out in a little bit more detail precisely what my position is. In other words, I am stating that if the statement that was made, contained in Paragraph No. 8 was unconstitutionally obtained that is perhaps in violation of Miranda rights or voluntariness standard or whatever constitutional rights referring to it is tainted evidence and that may not be used to support a subsequent probable cause to determination of the issue of the warrant.

THE COURT: You have indicated you have not argued this point before?

MR. FINOCCHIARO: Your Honor, I preface this by saying I do not know if your ruling takes this under its umbrella if you will.

THE COURT: The answer is yes.

MR. FINOCCHIARO: In other words, your ruling is that regardless of any factual inaccuracies or misrepresentations, that if there is unconstitutionally obtained evidence that may be used to obtain a search warrant? Is that what your ruling is, Your Honor? In other words, I have case law which I think seems to indicate to the contrary.

[30] MR. TURNER: I think all the Court has ruled is that they can't go behind the search warrant without making any ruling about constitutional, unconstitutional

or anything else. It is just the Defendant is barred from going behind the search warrant.

THE COURT: That is correct.

MR. FINOCCHIARO: Your Honor, there are cases after cases which talk about an illegal search and then goes on to determine that what was found during that illegal search cannot be used as probable cause for a subsequent search. Now, how can you determine that the second search was invalid unless you look and determine what the first search was and that is the problem that I am faced with this morning.

MR. TURNER: There is no previous search that I know of.

MR. FINOCCHIARO: I am talking about case law, talking about fourth amendment, fifth amendment. I think the argument is equally applicable.

THE COURT: Anything further, counsel?

MR. FINOCCHIARO: I have nothing further, Your Honor.

[31] MR. TURNER: I think the Court has already ruled.

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BAILEY—DIRECT EXAMINATION

[76] BY MR TURNER:

Q. Now, Mrs. Bailey, is the individual who intruded into your home and is the subject of what I have related present here in the courtroom?

A. Yes.

Q. Would you point him out, please?

A. This person here (indicating).

MR. TURNER: Let the record reflect that the [77] witness has pointed out the Defendant and identified him.

BY MR. TURNER:

Q. Approximately how long did you have an opportunity to observe him when the lighting conditions had reached daylight?

A. As far as I can recall it could have been no longer than ten to fifteen minutes.

Q. Now, when the refrigerator door was open, did you have an opportunity to observe him at that time?

A. Yes. That is when I first made notice especially of the clothing.

Q. And approximately how long was that?

A. One minute.

Q. Now, at all times throughout this entire period what was the furtherest away you were able to get from the Defendant throughout the entire period?

A. Probably a distance of four feet at the most.

Q. At the most?

A. Yes.

Q. That is he was constantly with you throughout the entire period you have related?

A. Yes.

• • • •

BROOKS—DIRECT EXAMINATION

[191] BY MR. TURNER:

Q. Now, on March 9 what did you do in connection with this investigation reference to search warrant?

A. We executed a search warrant on Jerome Franks' apartment at 222 South Governor's Avenue at which time clothing was confiscated matching the description of the clothing that the suspect in the rape had been wearing.

Q. At this point I show you State's for Identification A and ask you what significance this might have to you?

A. This was confiscated during the execution of the search warrant.

Q. Can you identify that as being the object of the search warrant or recovered on the search warrant?

A. Yes, sir, I can. It bears an evidence tag filled out by myself.

Q. By whom?

A. By myself.

MR. TURNER: At this point I move State's Identification A into evidence as Exhibit 1.

MR. FINOCCHIARO: Your Honor, I believe my [192] objection has previously been made on the basis

of the search, and I object to it on that ground. In addition, I question the fact that Mrs. Bailey is not sure precisely that it was—could not identify this as being something other than similar to what that alleged intruder was wearing. For those two reasons I object to its entry.

THE COURT: What purpose is it being introduced?

MR. TURNER: It is being introduced in conjunction as proof of what was found on the search warrant, answering the description that this officer had of the clothes that were worn by the Defendant.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 1.

(White thermal undershirt previously marked "State's Exhibit A, for Identification" marked "State's Exhibit No. 1" and received in evidence.)

BY MR. TURNER:

Q. I now show you State's for Identification B and ask you what significance that has to you?

A. This was also found in Jerome Franks' apartment during the execution of the search warrant. It bears the evidence tag that I filled out at the time.

[193] MR. TURNER: Move State's for Identification B into evidence as State's Exhibit 2.

MR. FINOCCHIARO: Again, Your Honor, I have the same objections as previously stated.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 2.

(Hat previously marked "State's Exhibit B, for Identification" marked "State's Exhibit No. 2" and received in evidence.)

BY MR. TURNER:

Q. I now show you State's for Identification C and ask you if you can identify that.

THE COURT: B for Identification will be admitted for the same purpose as A?

MR. TURNER: Yes, Your Honor.

THE WITNESS: This was also found in Jerome Franks' apartment by myself and marked as evidence. It bears my evidence tag.

MR. TURNER: Move to introduce into evidence State's exhibit C as State's 3.

MR. FINOCCHIARO: Again, Your Honor, the same objections.

[194] THE COURT: And introduced for the same purposes as A and B?

MR. TURNER: Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 3.

(Pants previously marked "State's Exhibit C, for Identification" marked "State's Exhibit No. 3" and received in evidence.)

BY MR. TURNER:

Q. State's for Identification D, what significance does that have to you?

A. This was also found in Jerome Franks' apartment by myself and does bear my evidence tag.

MR. TURNER: Move to introduce into evidence State's for Identification D as State's Exhibit 4.

MR. FINOCCHIARO: Your Honor, same objections.

MR. TURNER: Same reasons.

THE COURT: Introduced for the same purposes?

MR. TURNER. Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 4.

(Coat previously marked "State's Exhibit D, [195] for Identification" marked "State's Exhibit No. 4" and received in evidence.)

BY MR. TURNER:

Q. I now show you State's for Identification D—I'm sorry, E, and ask you what significance that may have to you.

A. This was found on the kitchen table of Jerome Franks' apartment during the execution of the search warrant marked with my evidence tag.

MR. TURNER: Move for introduction as State's Exhibit 5, State's for Identification E.

MR. FINOCCHIARO: Your Honor, I object to it on the same grounds. In addition, I believe that Cynthia Bailey indicated that she saw a knife in pitch blackness and apparently merely gave a description of it as being a knife. I question the evidenciary value of something found in the apartment without something more to designate that was the one allegedly used.

MR. TURNER: That is a jury question, the weight to be attached to it, Your Honor.

THE COURT: What purpose is it being introduced?

MR. TURNER: I represent it is being introduced [196] for the same purpose as all the other exhibits as found in the search warrant by this officer as being under a description that he had at that time.

THE COURT: For that purpose it will be admitted into evidence as State's Exhibit No. 5.

(Knife previously marked "State's Exhibit E, for Identification" marked "State's Exhibit No. 5" and received in evidence.)

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[215] BY MR. TURNER:

Q. Detective Brooks, just prior to the jury retiring I had asked you on Wednesday, March 10, in the early afternoon, did you contact the Defendant at the [216] Delaware Correctional Center?

A. Yes, sir, I did.

Q. Now, what conversation did you have with the Defendant at that time?

A. I first told Mr. Franks that I was there because I was investigating a rape in Dover and he was a suspect in it at that time. I then advised him that I would like to talk to him, but he had the right to remain silent, anything that he chose to say could and would be used against him in court at a later time, that he had the right to have an attorney present prior to my asking him questions and that if he could not afford an attorney the State of Delaware would provide one for him prior to him answering questions.

Q. What was his reply?

A. He replied that he didn't want an attorney, that he knew his rights better than I did and I proceeded to ask him questions.

Q. What questions did you ask him? What were his answers?

A. He at first told me that he didn't know anything about any rape and didn't know anybody by the name of [217-218] Cynthia Bailey. At that time I told him quite frankly I didn't believe him. We had executed a search warrant of his apartment and that I had found clothing fitting the description given by our victim and that I felt that I could place him at the house and it was at this time that he told me that Yes, he was at the house, that he had been there 5:00 in the morning on the fifth of March because he was aware that Mrs. Bailey's husband worked at night.

He had told me that he had met her up around Wesley College prior to this and talked shortly with her then and had seen her on several occasions since then, enough to say hello and wave and that he wanted to go over there and talk to her that morning.

When he got to the house he stated he found the back door open, but he didn't go in. He knocked on the door and Mrs. Bailey answered the door, was dressed in a nightgown and invited him inside and it appeared she hadn't been in bed.

They went to the living room, conversed for quite a while at which time the talk led to sex and she invited him upstairs at which time they had sex orally, anally and natural intercourse and that shortly after that [219] she observed that it was getting light and heard somebody outside getting into a car and told him that he had better leave, to use the back door and asked him if he would take the garbage out to the curb on his way out at which time he said he departed the residence.

Q. Did he mention anything about grape juice?

A. Yes. He said that upon her answering the door and inviting him in that she had asked him if he wanted a glass of grape juice and he declined.

Q. Now, I direct your attention to Tuesday, March 16 and ask you if you had occasion to see the Defendant again at the Delaware Correctional Institute?

A. Yes, sir, I did.

Q. And why did you see him on that day?

A. There had been a message relayed to me from Jerome Franks through Corporal McClements that he wanted me to come up and see him again, that he had forgot to tell me some things.

Q. What did you do on this occasion?

A. Again went up to the Delaware Correctional Center and I asked Jerome what he had wanted.

MR. FINOCCHIARO: Your Honor, excuse me. At [220] this time I would like to get a clarification of the ruling at the bench if I may.

THE COURT: Yes.

(Side bar conference not reported.)

BY MR. TURNER:

Q. Now, Detective Brooks, you have testified you went to the Delaware Correctional Center in response to a message from the Defendant wanting to see you. When you arrived there and after initial conversation what rights if any did you explain to the Defendant?

A. I again advised him that he had the right to remain silent, that anything he chose to say to me could and would be used against him in court at a later date, that he had the right to have an attorney present prior to my asking him any questions and if he couldn't afford an attorney the State of Delaware would provide him one prior to him answering questions.

Q. Now, then what conversation ensued?

A. At this time Jerome told me that he had forgot during our first conversation to tell me that Mrs. Bailey when she answered the door was wearing a very short tight nightie which showed most of her body and that the [221] sex that they had was with her consent, that he had never forced her to do anything and that he had never employed any knife against her to terrorize her in any way.

Q. And what was your reaction to that?

A. I told him that I didn't believe that, that my investigation seemed to point otherwise.

We then conversed about it more and Jerome finally admitted to me that he hadn't really been let into the house by Mrs. Bailey that morning, that he had gone there, he had found the back door open and he had gone into the house.

Once inside the residence he removed a storm window screen from one of the downstairs windows in the dining room of the house and he put it against a building outside, against the side of the house. He intended to take that screen back to his apartment to repair a window back there he had broken.

He said he then went to the second floor of the residence where he found Mrs. Bailey in bed asleep and she awoke. They started a conversation at which time she consented to have sex with him. They had sex as he previously described in his first conversation with me [222] and he left the house.

Q. Now, were you present when Mrs. Bailey viewed photographs at the police station?

A. Yes, sir, I was.

Q. When was that?

A. She viewed some photographs on Friday, March 5, during the afternoon hours and some Saturday, March 6, in the morning hours.

Q. March 5 and March 6?

A. Yes, sir.

Q. About how many photographs were shown to her?

A. I would estimate approximately a thousand.

Q. And that was the afternoon of March 5 and the morning of March 6?

A. Yes, sir.

Q. What county is the residence of Bailey in?

A. Kent County.

MR. TURNER: You may cross-examine.

* * * *

[245] LUCAS—CROSS-EXAMINATION

BY MR. TURNER:

Q. Mr. Lucas, isn't it true that Mr. Franks frequently wore a thermal undershirt and a brown jacket and a dark green knit hat?

A. Yes, I have seen him wear that.

Q. And, Mr. Lucas, at the Youth Center what is [246] your particular capacity?

A. I have been the chief counselor for the six years that it has been open.

Q. Now, when Mr. Franks worked there he didn't work under your direct supervision, did he?

A. No, he did not.

Q. As a matter of fact, you were in an office most of the time, were you not?

A. I was either in the office or in the cell block working.

Q. And Mr. Franks was working out of your vision most of the time?

A. I guess I would have to say yes.

Q. Do you recall on March 4, that is the date before you have testified to, if Mr. Franks was wearing a white thermal undershirt and a green knit cap?

A. I recall the white thermal shirt, but I do not recall the green cap.

Q. How about the leather jacket?

A. I have seen him wear the leather jacket frequently.

Q. On Thursday, March 4, do you recall that he was [247] wearing this leather jacket, State's Exhibit 4?

A. Yes, I recall that.

Q. He was wearing that March 4?

A. Right.

Q. Do you recall on March 4—State's Exhibit 1—a white thermal undershirt. Do you recall whether he was dressed in something like that on March 4?

A. Something like that, yes, sir.

MR. TURNER: No further questions.

REDIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q. Mr. Lucas, you quite frequently saw Mr. Franks wearing other things, too, didn't you?

A. That's correct.

Q. Is there any way you can characterize or give a number as to how often he might have worn a particular shirt?

A. You are talking about the white shirt?

Q. Would you say he wore different things quite often?

A. Yes, he didn't wear the same thing everyday.

MR. FINOCCHIARO: No further questions.

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[253] FRANKS—DIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q. Mr. Franks, before I go any further I think [254] there is a question that the ladies and gentlemen of the jury have on their mind. Did you have sexual intercourse with Cynthia Bailey on March 5, 1976?

A. Yes, I did.

Q. Was this intercourse voluntary or involuntary?

A. It was voluntary.

Q. Was there any type of force used?

A. No, sir.

Q. Did you employ a knife?

A. No, sir.

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 259, 1976

JEROME FRANKS, DEFENDANT BELOW, APPELLANT,

v.

STATE OF DELAWARE, PLAINTIFF BELOW, APPELLEE.

Submitted: March 16, 1977

Decided: April 29, 1977

Before HERRMANN, Chief Justice, DUFFY and McNEILLY, Justices.

Upon appeal from Superior Court. Affirmed.

Donald W. Huntley, Assistant Public Defender, Wilmington, for defendant below, appellant.

Harrison F. Turner, Deputy Attorney General, Dover, for plaintiff below, appellee.

McNEILLY, Justice:

Defendant appeals his conviction by a Superior Court jury of first degree rape, 11 *Del.C.* § 764,* second degree kidnapping, 11 *Del.C.* § 783,** and first degree burglary,

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* 11 *Del.C.* § 764 provides:

"A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and

"(1) In the course of the offense he inflicts serious physical, mental or emotional injury upon the victim, or

"(2) The victim was not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact."

"Rape in the first degree is a class A felony."

** 11 *Del.C.* § 783 provides:

"A person is guilty of kidnapping in the second degree when he unlawfully restrains another person with any of the following purposes:

11 *Del.C.* § 826,*** contending that the Trial Court erred in refusing to hear impeachment testimony at a suppression hearing. We disagree.

I.

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant and identified defendant as the assailant.

A search warrant was obtained by the police and used to seize articles of defendant's clothing and a knife, which were introduced at trial over defendant's objection. The Trial Court refused to hear evidence offered at the suppression hearing to impeach the averments of the affidavit used to establish probable cause for the issuance of the search warrant.

"(1) To hold him for ransom or reward; or

"(2) To use him as a shield or hostage; or

"(3) To facilitate the commission of any felony or flight thereafter; or

"(4) To inflict physical injury upon him, or to violate or abuse him sexually; or

"(5) To terrorize him or a third person;

and the actor voluntarily releases the victim alive, unharmed, and in a safe place prior to trial."

"Kidnapping in the second degree is a class B felony."

*** 11 *Del.C.* § 826 provides:

"A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, he or another participant in the crime:

"(1) Is armed with explosives or a deadly weapon; or

"(2) Causes physical injury to any person who is not a participant in the crime."

"Burglary in the first degree is a class B felony."

At trial, defendant did not deny that he had had intercourse with the victim, asserting the defense of consent.

II.

Defendant contends that the Trial Court erred in refusing to hear testimony at the suppression hearing which would have impeached the affidavit establishing probable cause for the search warrant; that this violated the Fourth Amendment prohibition against unreasonable searches and seizures and the requirement that no search warrant shall issue but upon probable cause, supported by oath or affirmation. There is no attack upon the validity of the warrant on its face, and the United States Supreme Court has left open the extent to which a supporting affidavit may be challenged for accuracy. *Rugendorf* v. *United States*, 376 U.S. 528, 531-32, 84 S.Ct. 825, 827-28, 11 L.Ed.2d 887, 891 (1964). The majority of the jurisdictions considering this question have decided that no attack upon the veracity of an underlying affidavit may be made. See 68 Am. Jur.2d *Searches and Seizures* § 66 (1973). We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits. See *State* v. *Petillo*, N.J. Supr., 293 A.2d 649 (1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1393, 35 L.Ed. 2d 611 (1973); *Carter* v. *State*, Md. App., 337 A.2d 415 (1975).

Because of the resolution of this issue there is no need to consider defendant's other contentions, relating to the evidence that would have been introduced for impeachment purposes.

* * * *

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 77-5176

JEROME FRANKS, PETITIONER,

v.

DELAWARE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 11, 1977

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